

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

MONICK TRIPP
Claimant

APPEAL 17A-UI-06774-JCT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HEARTLAND HEALTH MANAGEMENT
Employer

**OC: 06/11/17
Claimant: Respondent (2)**

Iowa Code § 96.5(1) – Voluntary Quitting
Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(7) – Excessive Unexcused Absenteeism
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

The employer filed an appeal from the June 30, 2017, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on August 4, 2017. The employer participated through Sheila Matheney, administrator. Lisa Perrenoud, director of nursing, testified. John Winga attended as an observer. The claimant participated personally. Christopher Spaulding, attorney at law, represented the claimant for the first hour of hearing. Matt Denning represented the claimant for the remainder of the hearing. Employer Exhibits 1 through 5 and Claimant Exhibits A through F were received into evidence. The administrative law judge took official notice of the administrative records including the fact-finding documents. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Did the claimant voluntarily quit the employment with good cause attributable to the employer, or was the claimant discharged for disqualifying job-related misconduct?
Has the claimant been overpaid any unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?
Can any charges to the employer's account be waived?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full-time as a certified nursing aide (CNA) and was separated from employment on June 1, 2017. She last performed work on February 26, 2017.

In December 2016, the claimant stated she injured her right knee and made the employer aware of a possible work-related injury on approximately January 6, 2017, when a wound nurse at the

employer first looked at the claimant's knee and advised she needed medical care. The claimant visited the emergency room independently and then began seeing Dr. Metcalf, a physician recommended by the employer through worker's compensation (Claimant Exhibit D and E). Dr. Metcalf advised the claimant discontinue use of crutches and imposed restrictions at the workplace including wearing a neoprene sleeve, and not performing work that would involve pushing or transferring of residents. The employer was able to modify the claimant's job duties so she could perform some of her work, and she worked under the restrictions until February 26, 2017.

On February 24, 2017, the worker's compensation doctor discontinued providing care, but had referred the claimant to surgeon, Dr. Joseph Tansey. The claimant worked the weekend shift on February 25 and 26, and felt she was being asked to perform tasks outside of her restrictions. When she advised Ms. Matheny on February 26, 2017, she was advised to speak to her doctor and to request an update. On March 1, 2017, in a meeting with Ms. Matheny, the claimant was provided paperwork for her physician to fill out to support a leave of absence through Family and Medical Leave Act (FMLA) (Employer Exhibit 3). The claimant did not want to continue to work with the restrictions imposed by Dr. Metcalf. She was also provided written instructions from the employer regarding the leave of absence (Employer Exhibit 2/Claimant Exhibit B). Specifically, the claimant was advised she was to communicate with the employer with reports of her status and intent to return to work every two weeks (Employer Exhibit 2/Claimant Exhibit B.)

The claimant contacted the employer on March 30, 2017. Ms. Matheny was not on-site, so the claimant spoke to her immediate supervisor, Lisa Perrenoud, and stated she had new restrictions, consisting of a five pound weight limit and sedentary only position (Claimant Exhibit A). Ms. Perrenoud did not have the authority to evaluate the restrictions or whether they would be accommodated. The claimant was advised Ms. Matheny would be out of the office a few weeks. The claimant never followed up with the employer after the March 30, 2017 call.

Unbeknownst to the employer, the claimant had surgery on her knee on April 28, 2017. She did not inform the employer. Her FMLA expired on May 24, 2017, and the employer extended the claimant a one week grace period to allow her to provide an update, or alternately a full release from work. On June 1, 2017, the employer mailed the claimant a letter, stating separation had ensued due to her lack of contact and failure to return to work after the approved leave of absence (Employer Exhibit 1/Claimant Exhibit C). The claimant had not been released from her doctor's care on June 1, 2017 but had a doctor's appointment scheduled for June 13, 2017, in which she was released. Upon receiving the employer's letter, the claimant took no steps to inform the employer she had intended to return or had a final doctor's appointment scheduled soon, and that she expected to be released without restrictions at that time.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$648.00, since filing a claim with an effective date of June 11, 2017. The administrative record also establishes that the employer did participate in the fact-finding interview on June 28, 2017.

REASONINGS AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant's separation from the employment was without good cause attributable to the employer.

Iowa Code § 96.5-1 provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

Iowa Admin. Code r. 871-24.25(27) provides:

Voluntary quit without good cause. In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer from whom the employee has separated. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code section 96.5. However, the claimant has the initial burden to produce evidence that the claimant is not disqualified for benefits in cases involving Iowa Code section 96.5, subsection (1), paragraphs "a" through "i," and subsection 10. The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer:

(27) The claimant left rather than perform the assigned work as instructed.

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.* Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the evidence does not support the claimant was discharged, but rather, voluntarily quit when she failed to maintain contact while on a leave of absence and failed to return upon expiration of the leave of absence.

Iowa unemployment insurance law disqualifies claimants who voluntarily quit employment without good cause attributable to the employer or who are discharged for work-connected misconduct. Iowa Code §§ 96.5(1) and 96.5(2)a. A voluntary quitting of employment requires that an employee exercise a voluntary choice between remaining employed or terminating the employment relationship. *Wills v. Emp't Appeal Bd.*, 447 N.W.2d 137, 138 (Iowa 1989); *Peck v. Emp't Appeal Bd.*, 492 N.W.2d 438, 440 (Iowa Ct. App. 1992). The claimant has the burden of proving that the voluntary leaving was for good cause attributable to the employer. Iowa Code § 96.6(2).

The credible evidence presented does not support the claimant was discharged or that continuing work was not available. Rather, the claimant last performed work on February 26, 2017 before she went on an approved leave of absence through Family and Medical Leave Act (FMLA) (Employer Exhibit 3). The claimant was made aware in writing, that she was required to

maintain contact with the employer every two weeks and provide updates (Employer Exhibit 2/Claimant Exhibit B.) The claimant last contacted her employer on March 30, 2017 to provide updated restrictions (Claimant Exhibit A). The claimant was advised the administrator, Sheila Matheny, was unavailable at the time of her call, so her restrictions could not be evaluated at that time.

The claimant made no attempts thereafter to confirm Ms. Matheny received her message about restrictions, or to update her that she planned to have surgery or planned to return. The administrative law judge is not persuaded the claimant intended to preserve employment, based on her lack of communication with the employer. The claimant did not comply with maintaining communication with the employer every two weeks, as she had no contact between March 30, 2017 and June 1, 2017. It is unreasonable to expect the employer would know, or seek out updates from the claimant, while preserving her job. Nor would it be reasonable for the employer to hold the claimant's job open indefinitely. When the claimant received the letter of separation, she made no attempts to contact the employer that she expected to be released without restrictions at her next scheduled doctor's appointment, which was June 13, 2017. This further supports the claimant had no plans to return to employment. Based on the evidence presented, the administrative law judge concludes the claimant voluntarily quit the employment because she abandoned her job following an approved leave of absence. Benefits are denied.

In the alternative, if this separation was categorized as a discharge, the claimant would remain disqualified from benefits.

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:

a. The disqualification shall continue until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

Iowa Admin. Code r. 871-24.32(1)a provides:

Discharge for misconduct.

(1) Definition.

a. "Misconduct" is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith

errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

Iowa Admin. Code r. 871-24.32(7) provides:

(7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

An employer is entitled to expect its employees to report to work as scheduled or to be notified in a timely manner as to when and why the employee is unable to report to work. Absences due to illness or injury must be properly reported in order to be excused. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The claimant in this case was made aware that she was expected to maintain contact with the employer every two weeks while on her leave of absence. The undisputed evidence is the claimant failed to maintain any contact with the employer from March 30, 2017 until June 1, 2017, even though she was informed in writing of the employer's expectations and knew or should have known her employment would not be held open indefinitely. The claimant failed to properly notify the employer of her absences (or provide an update of her condition) for a period of two months.

The question of whether the refusal to perform a specific task constitutes misconduct must be determined by evaluating both the reasonableness of the employer's request in light of all circumstances and the employee's reason for noncompliance. *Endicott v. Iowa Dep't of Job Serv.*, 367 N.W.2d 300 (Iowa Ct. App. 1985). The claimant failed to present any persuasive evidence to justify her failure to maintain contact with the employer for a period of two months, or any intent to return to the employment. The claimant made no good faith effort to preserve employment and simply discontinued reporting to the employer. Whether characterized as a quit or discharge, benefits are denied.

Iowa Code § 96.3(7)a-b provides:

7. Recovery of overpayment of benefits.

a. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

b. (1) (a) If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding § 96.8, subsection 5. The employer shall not be relieved of charges if benefits are paid because the employer or an agent of the employer failed to respond timely or adequately to the department's request for

information relating to the payment of benefits. This prohibition against relief of charges shall apply to both contributory and reimbursable employers.

(b) However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to § 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this states pursuant to § 602.10101.

Iowa Admin. Code r. 871-24.10 provides:

Employer and employer representative participation in fact-finding interviews.

(1) "Participate," as the term is used for employers in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means submitting detailed factual information of the quantity and quality that if unrebutted would be sufficient to result in a decision favorable to the employer. The most effective means to participate is to provide live testimony at the interview from a witness with firsthand knowledge of the events leading to the separation. If no live testimony is provided, the employer must provide the name and telephone number of an employee with firsthand information who may be contacted, if necessary, for rebuttal. A party may also participate by providing detailed written statements or documents that provide detailed factual information of the events leading to separation. At a minimum, the information provided by the employer or the employer's representative must identify the dates and particular circumstances of the incident or incidents, including, in the case of discharge, the act or omissions of the claimant or, in the event of a voluntary separation, the stated reason for the quit. The specific rule or policy must be submitted if the claimant was discharged for violating such rule or policy. In the case of discharge for attendance violations, the information must include the circumstances of all incidents the employer or the employer's representative contends meet the definition of unexcused absences as set forth in 871—subrule 24.32(7). On the other hand, written or oral statements or general conclusions without supporting detailed factual information and information submitted after the fact-finding decision has been issued are not considered participation within the meaning of the statute.

(2) "A continuous pattern of nonparticipation in the initial determination to award benefits," pursuant to Iowa Code section 96.6, subsection 2, as the term is used for an entity representing employers, means on 25 or more occasions in a calendar quarter beginning with the first calendar quarter of 2009, the entity files appeals after failing to participate. Appeals filed but withdrawn before the day of the contested case hearing will not be considered in determining if a continuous pattern of nonparticipation exists. The division administrator shall notify the employer's representative in writing after each such appeal.

(3) If the division administrator finds that an entity representing employers as defined in Iowa Code section 96.6, subsection 2, has engaged in a continuous pattern of nonparticipation, the division administrator shall suspend said representative for a period of up to six months on the first occasion, up to one year on the second occasion and up to ten years on the third or subsequent occasion. Suspension by the division administrator constitutes final agency action and may be appealed pursuant to Iowa Code section 17A.19.

(4) "Fraud or willful misrepresentation by the individual," as the term is used for claimants in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means providing knowingly false statements or knowingly false denials of material facts for the purpose of obtaining unemployment insurance benefits. Statements or denials may be either oral or written by the claimant. Inadvertent misstatements or mistakes made in good faith are not considered fraud or willful misrepresentation.

This rule is intended to implement Iowa Code section 96.3(7)"b" as amended by 2008 Iowa Acts, Senate File 2160.

Because the claimant's separation was disqualifying, benefits were paid to which he was not entitled. The claimant has been overpaid benefits in the amount of \$648.00. The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits if it is determined that it did participate in the fact-finding interview. Iowa Code § 96.3(7), Iowa Admin. Code r. 871-24.10. In this case, the claimant has received benefits but was not eligible for those benefits. The employer satisfactorily participated in the scheduled fact-finding interview. Since the employer did participate in the fact-finding interview the claimant is obligated to repay the benefits she received and the employer's account shall not be charged.

DECISION:

The June 30, 2017, (reference 01) decision is reversed. The claimant quit the employment by way of job abandonment, without good cause attributable to the employer. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The claimant has been overpaid benefits in the amount of \$648.00 and is obligated to repay the benefits. The employer's account is relieved of charges associated with the claim.

Jennifer L. Beckman
Administrative Law Judge

Decision Dated and Mailed

jlb/scn